SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 3
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PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

PLAINTIFF,

-against-

Index No: 451625/2020

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,

DEFENDANTS.
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Oral Argument
Via Microsoft Teams
December 10, 2021

B E F O R E:

THE HONORABLE JOEL M. COHEN
J U S T I C E

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THE COURT: Good morning, everyone.

Let's begin with appearances beginning with the plaintiff.

MR. CONLEY: Good morning, your Honor.

My name is Jonathan Conley, I'm an Assistant Attorney General for the New York State Attorney General's Office. I'll be arguing in opposition to today's motions on behalf of the plaintiff, the People of The State of New York.

THE COURT: Okay. And your colleague?

MS. CONNELL: Good morning, your Honor.

Monica Connell of the New York State Attorney General's office, and I'll be addressing the discovery and sort of issues.

THE COURT: And for the defendants again, if you can, we're going to need you to go to a microphone when you speak, either the one on the table or the one at the lectern. For now, just to enter appearances, maybe we don't need to do too much running around, but it's going to be hard to hear through all the glass.

So for the defense?

MS. EISENBERG: Your Honor, Svetlana Eisenberg on behalf of the National Rifle Association of America. I'm joined by my colleague, David Partida, from Brewer, Attorneys & Counselors.

Good morning.

THE COURT: Good morning.

MR. CORRELL: Your Honor, Kent Correll for Wayne LaPierre, and I'll be presenting on his motion to dismiss the four causes of action asserted against him in the complaint.

Good morning.

MR. FLEMING: Your Honor, good morning.

William Fleming for defendant John Frazer, and I will be arguing his motion to dismiss. Thank you.

MR. FARBER: Your Honor, this is Seth Farber on behalf of Mr. Phillips. Can you hear me?

THE COURT: Yes.

MR. FARBER: So I could not hear whichever attorneys were speaking before that.

THE COURT: Yeah. We were not -- everybody was in front of a mic. But if you can hear me now, you'll be able to hear folks when they're in front of a mic and they're all turned on.

MR. MACDOUGALL: Mark MacDougall of Akin Gump Strauss, along with John McLish and Samantha Block, representing defendant Joshua Powell, and we're here to address the question of the examination of possibly privileged communications in the possession of Mr. Powell. Thank you.

THE COURT: Thank you.

All right. In terms of agenda, here's what I'd like to do: We have, roughly, till 12:30, and I'd like to reserve at least a half hour to deal with the various discovery-related issues. And if we can finish the argument before 12:00, that's great, but you should view 12:00 as a stop point for the argument, and then we're going to switch to a status conference; okay? And I think the best way to do it is to start with the NRA motion back and forth. And then the individuals, I don't know whether you're going to argue them together or one at a time, whichever order you all want to go is fine by me; okay?

MR. FLEMING: Yes, your Honor.

THE COURT: And I think there would be some efficiencies in having all the defendants go with their initial argument and then just the Attorney General respond, rather than going back and forth three times because most of the arguments -- some of the arguments overlap; fair?

MR. CORRELL: Fair enough, your Honor.

MR. FLEMING: Yes.

THE COURT: Okay. Let's begin then.

Ms. Eisenberg, for the NRA.

MS. EISENBERG: Thank you.

THE COURT: Slides, I see.

MS. EISENBERG: Good morning, your Honor.

THE COURT: Good morning.

MS. EISENBERG: As you well know, in this case --

THE COURT: Can I just ask you to just either you move closer to the mic or the mic closer to you?

MS. EISENBERG: I'll be happy to do so, your Honor.

THE COURT: Okay.

MS. EISENBERG: As the Court well knows, in this action, the New York State Attorney General seeks a remedy against the NRA which is nothing short of Draconian. In two of her six counts against the NRA, the Attorney General seeks to dissolve the Association. However, there are two problems with her claim at least, and you have multiple independent bases upon which to dismiss those claims. First, the law simply does not provide for dissolution based on the fact that the New York Attorney General alleged. She, herself, admitted in a recent bankruptcy proceeding that in order to prevail on her dissolution claim, she would have to show that the Association engaged in such egregious misconduct, that there is injury to the public, or at least menace to the public.

The statutes on which she relies requires her to plead that the NRA conducted its business in a persistently fraudulent or illegal manner. And the other statute requires her to show that directors and officers who are in

control of the Association perpetrated the corporation for their, "sole" personal benefit. She does not allege any of those things and that is a basis for dismissing both of her dissolution claims pursuant to the CPLR.

THE COURT: Maybe we can have your colleague do the moving of the slides. I don't want you to have to go back and forth each time.

MS. EISENBERG: Thank you, your Honor.

As I mentioned, the statute talks about the NRA's business; right? It says if a corporation conducts its business or conducted its business in a persistently fraudulent or illegal way, that can be a basis for dissolution. So I want to speak, if I may, about the NRA's business. Here, we have a quote from the NRA's bylaws. Article 1 of the bylaws sets forth the NRA's objectives and purposes, and they are, amongst others, to protect the United States Constitution, to promote public safety, law and order, to train members of law enforcement and others in marksmanship skills, to support the shooting sports and to promote hunter safety. Your Honor, I read the complaint back to back. Nowhere does the Attorney General even talk about any of these things, let alone allege that the NRA does any of them in a fraudulent way, in an illegal way or a persistently fraudulent and illegal way.

Would you please go to Slide 11? Your Honor, I

apologize there's a bit of a delay with slides. I'm just going to go forward.

There's a separate and independent basis upon which the Court has discretion to dismiss the claims by the New York Attorney General, and that is the equitable doctrine of collateral estoppel. As the Court well knows, collateral estoppel, you must show that the issues that were decided in a prior proceeding are identical to the ones here and that they were necessary to the ruling in the previous case. As you know, your Honor, on May 11th, 2021, earlier this year, the United States Bankruptcy Judge for the Northern District of Texas ruled that the NRA's Chapter 11 proceeding should be dismissed, but he did so only after finding specifically that appointment of a trustee, which is the relief that the New York Attorney General sought, was not in the best interest of either the NRA's creditors or the NRA estate --

THE COURT: But that was in the context of sort of a bankruptcy-related trustee, not the kind of trustee that we're talking about here; right?

MS. EISENBERG: What --

THE COURT: The Court there didn't have the authority to appoint a trustee in the same manner that the Attorney General does.

MS. EISENBERG: I'm not aware of the Attorney General being able to appoint a trustee pursuant to New York

law either, your Honor, so I'm not sure what the Court --

THE COURT: Well, the relief that the government is seeking here is different than appointing the trustee that was sought in Texas; right?

MS. EISENBERG: Yes, absolutely, your Honor.

THE COURT: Different standards would apply.

MS. EISENBERG: Yes -- well, no. The standard would be the same. And this is collateral estoppel. We're not talking about res judicata.

THE COURT: Well, I know. So what are the -- are you taking the position that all the factual findings, both positive and negative, would all just come into this court and are all assumed are -- you would also be estopped from challenging any of the factual findings the Judge there made about the various allegations made down there?

MS. EISENBERG: Your Honor, no. There are certain findings that Judge Hale made that were crucial to his ruling. The ruling starts on Page 18 and then the second part of it starts on Page 33. That's where he discusses whether there's cause to dismiss. And starting on Page 33, he is discussing whether there is a basis for appointment of a trustee or an examiner, and in the course of that discussion, he makes a variety of different factual findings. And yes, your Honor, some of them are of a slightly negative nature. And, yes.

So as to those that are critical to his ruling, sure they can come in, but there's other rules or there's other comments that are clearly dicta. For example, there are comments made in the conclusion section after the Court already found that there was no basis for the appointment of a trustee or an examiner, and that is classic dicta and that should not come in.

THE COURT: Okay.

MS. EISENBERG: Okay. And then there's other comments that the Judge made that I agree are somewhat negative, but if you read them in context, what he's really saying is, yes, the New York Attorney General has presented some evidence of past misconduct, yes, that is of concern, however, and then goes onto find to make his ultimate factual finding that underpins his trustee ruling. And what the finding is, your Honor, is that the NRA understands the importance of compliance; that the NRA can do the following three things: One, it can continue to fulfill its mission; two, it can continue to improve its governance; three, it can continue to improve its internal controls. And by the way, none of that would have been possible according to a credible witness who the Judge found, but for Mr. LaPierre's support for the self correction that the NRA did.

So, that's the factual finding that the Court made, it was necessary to the Court's ruling, and it's certainly

an issue that the New York Attorney General litigated. Moreover, it is dispositive here because if you look at his factual findings and the ruling that it was not in the best interest of the estate to appoint a trustee, it cannot possibly be true that any of the potential basis under the statute for dissolution are true. For example, one of the bases is that the Association conducted its business in a persistently fraudulent and illegal manner --

THE COURT: Past tense.

MS. EISENBERG: Correct, yes. Without the "has", although it's used with the "has" in the complaint.

Now, no bankruptcy judge could ever forgo appointing a trustee if he or she found that that's what the corporation was doing. No bankruptcy --

THE COURT: Well, let me make sure I understand the procedure down there. The result was, essentially, to dismiss the bankruptcy petition; right?

MS. EISENBERG: Yes, your Honor, it is. However, the ruling was contingent on two separate sub rulings or findings. First, under Section 1112 of Title 11 of the United States Code, the Court has to decide whether there is cause to dismiss the Chapter 11 proceeding and, that's what the Judge does. Starting on Page 18, he focuses on what was the purpose for the filing. He makes a finding, he says that's not a purpose that's intended by the Code, therefore,

there is cause. And then very clearly, starting on Page 33 and also in the introduction, he says there's a second requirement. Section 1112(b) of the Bankruptcy Code, which is the dismissal statute, directs him to look at Section 1104(2). And let me just make sure I got the --

THE COURT: 1104(a)(2).

MS. EISENBERG: Thank you, your Honor. 1104(a), and he has to determine whether the appointment of a trustee under Section 1104(a) is in the best interests of creditors and the estate. If he finds that it is, he cannot dismiss even if there's cause, he can only dismiss if he makes the opposite finding or ruling. And then, naturally, we'll look at Section 1104. Section 1104 consists of two sections; 1104(a)(1) and 1104 (a)(2), and that is the section pursuant to which the New York Attorney General sought her trustee relief. A movant is entitled to that relief if he or she shows that present management engaged in present or past incompetence, mismanagement fraud or dishonesty or similar conduct, or, if its otherwise in the interest of the creditors and the estate for a trustee to be appointed.

So he sat through or listened to the evidence during the 12-day trial, heard from 23 witnesses. This came on the heels of fulsome discovery which, in turn, came on the heels of a fulsome investigation by the Attorney General. And after hearing all that evidence, he found that

the NRA understands the importance of compliance, can continue to fulfill its mission and so on and so on. So at the end, it's very clear that each and every one of the requirements for the collateral estoppel exists here.

Now, the Attorney General says she didn't have a full and fair opportunity to litigate the issue. Your Honor, no basis for that assertion whatsoever. First of all, there was fulsome discovery; it involved 16 depositions and over 24,000 documents being produced. Second, the trial itself was lengthy and involved many witnesses as I just said. And in her investigation that preceded the bankruptcy trial, she took testimony under oath of 13 witnesses, and over 100,000 documents were produced pursuant to subpoenas to the New York Attorney General.

Now, what's really interesting is that the Kaufman case, which we cite in our motion, makes very clear that the evidentiary burden is on the party resisting the application of collateral estoppel, here, the New York Attorney General, to show that she did not have a full and fair opportunity to litigate. Your Honor, I respectfully submit not only did they not meet that evidentiary burden, they failed to make any attempt to do so.

THE COURT: I assume you agree with it was an expedited proceeding. But putting that aside, how would any of this be dispositive of this case?

MS. EISENBERG: Yes, your Honor.

So what we need to do is look at the dissolution statutes that she relies on and the motion that she filed. The motion that she filed sought two types of remedies: One, dismissal; and, two, appointment of a trustee. And in furtherance of her request to appoint a trustee, she incorporated wholesale her complaint in this case. She said, here it is, Exhibit A, and she said, Even the sampling that I provide in my complaint would make cause for appointments of a trustee, and then she went one by one through a variety of the allegations from the complaint and she said, And this happened and this happened and, therefore, you cannot trust current management, therefore, you must appoint a trustee. And she also argued that the management had engaged in persistently fraudulent or illegal conduct.

So even though the words are not identical, in sum and substance, the factual findings there are. And the findings that the Judge made in the bankruptcy proceeding are fatal to her ability to proceed with her dissolution claims --

THE COURT: And what's the relevance of the fact that the Judge who actually issued the decision stated that he was not seeking to decide any issues in this case? I mean, the whole point of -- well, a lot of the point of his

decision was that the bankruptcy filing was an attempt to get out of this case, and now you're saying that in the course of making that ruling, he essentially let you out of this case. It seems to be a big circle.

MS. EISENBERG: Your Honor, I think you're referring to what appears on Page 28 of Judge Hale's ruling. And, respectfully, the weight and meaning that the Attorney General attaches to that phrase, there's no basis for that. If you read it in context, what the Judge is saying is, according to the Attorney General, in order to obtain dissolution, she has to show harm to the public, she has to show egregious conduct, she has to show all those things that I just discussed; right? And then he says, okay, well, a dissolution that requires this type of showing, this high type of showing, is not the type of dissolution that the Bankruptcy Code is meant to protect against. And then he says, I'm not saying one way or another whether she could prevail, but what I'm saying is that the threat that exists because she filed those claims is not the type of threat that the Bankruptcy Code protects against.

In addition, in a different part of the ruling, he specifically says the NRA can continue to fulfill its mission, improve its internal control and governance and contest her dissolution claims. So for anyone to cherry pick such statements and try to attribute holding-type

weight for it or ruling-type weight to it or collateral-estoppel-type weight to it, there's simply no weight to that.

THE COURT: You see the irony of your approach, right? That the whole thrust of that proceeding down there was that at least the Judge said that what he perceived as an attempt to avoid this case was an inappropriate basis to seek bankruptcy protection, and you're saying that in that same opinion, he made a ruling that you now say requires dismissal of this case.

MS. EISENBERG: Your Honor, there's surely irony, but nothing about it is unfair toward the New York Attorney General. And we tried to make it very clear in our papers, and I would like to go over it again.

THE COURT: Okay.

MS. EISENBERG: To be clear, the New York Attorney General voluntarily intervened in the Chapter 11 proceeding. There was no -- your Honor asked the parties when the Chapter 11 proceeding was filed whether this proceeding would be stayed, and the answer was, While we reserve our rights, we are not seeking a stay. So there was nothing compelling her to intervene, yet, she decided to intervene. There is nothing compelling her to seek the appointment of a trustee, yet, she decided to litigate that issue. There was nothing compelling her to base her request for relief on the

very same facts that she alleges in this case, yet, that's exactly what she chose to do, and so on and so forth.

So when the Court issued a ruling that made those adverse factual findings that were against the Attorney General, that was all of her own making. And on top of that, the law is clear, there's Supreme Court precedent and Fifth Circuit precedent about that too, she could have appealed his ruling to reform to the extent it contained factual findings that are collaterally estopping her here from seeking the dissolution relief.

THE COURT: Okay. Well, let's move onto the next argument.

MS. EISENBERG: Yes, your Honor. I think that that was the main point that I wanted to communicate to the Court. If you have any additional questions, I would be happy to answer them.

THE COURT: Okay. So the collateral estoppel is your principal argument for dismissal?

MS. EISENBERG: I have two principal arguments; one is sufficiency under 3211(a)(7) because the test is so high, as she admitted to Judge Hale, and she alleges nothing of the kind. But then separate and apart, she's collaterally estopped from pursuing those claims.

THE COURT: Okay. Thank you.

I'm going to have the Attorney General respond to

the NRA.

MR. CONLEY: Thank you, your Honor.

THE COURT: Mr. Conley.

MR. CONLEY: As a threshold issue, we believe that the motions brought today are barred by the single motion rule and CPLR 3211(e). Would you like me to address that now --

THE COURT: I think I have that argument.

MR. CONLEY: I'm sorry?

THE COURT: I understand the argument.

MR. CONLEY: Okay. With respect to the NRA's collateral estoppel argument, as set forth in our opposition papers, the argument is fundamentally flawed and deeply cynical. The basis of the NRA's argument is a decision by a Texas Federal Court that granted the Attorney General's motion to dismiss the NRA's bankruptcy filing for lack of good faith. In that decision, the Bankruptcy Court made clear that it was dismissing the bankruptcy petition because the NRA was improperly trying to use Chapter 11 bankruptcy protection to escape the state enforcement action. And in that decision, the Bankruptcy Court warned the NRA that were it to file for bankruptcy again, it would immediately take up its myriad of concerns regarding the lack of transparency, lack of disclosure, conflicts of interest with its litigation counsel and officers, and warned that this

could result in the appointment of a trustee out of concern that the NRA could not fulfill its fiduciary duties as a debtor in possession. In short, the Bankruptcy Court rejected the NRA's illegitimate attempt to use bankruptcy to evade the State of New York's jurisdiction. It's perverse that the NRA is now trying to use the Bankruptcy Court's findings to defeat this action.

Collateral estoppel is an equitable doctrine and it would make no sense to preclude the Attorney General's claims in this action because a judicial finding expressly rejected the NRA's attempt to evade accountability here. In any event, the requirements for collateral estoppel are not met because the issues decided in the bankruptcy proceeding are not the same as those presented in the challenged causes of action, nor are they legally dispositive of those claims.

This action and the bankruptcy proceeding differ significantly in scope, procedural posture and the applicable legal standards. The bankruptcy proceeding was a plenary proceeding addressing two motions to dismiss on the limited factual record in which the Court addressed the limited issues of whether cause existed under federal law to dismiss the NRA's bankruptcy petition for lack of good faith, or, in the alternative, to appoint a trustee or an examiner. In contrast, the operative complaint here contains over 750 paragraphs of detailed factual allegations

of corporate malfeasance that expands decades and asserts 18 causes of action under numerous New York statutes against the NRA and four current and former NRA executives. The Attorney General did not intend and did not have the burden to prove out the 18 causes of action asserted here in the expedited federal hearing held on her motions in the particular bankruptcy proceeding. Consequently, the Attorney General did not have a full and fair opportunity to litigate the issues in this enforcement action in the narrow confines of that proceeding which took place on an accelerated schedule that allowed for only truncated discovery.

The NRA bases its collateral estoppel argument on certain statements that are plucked from the Bankruptcy Court decision such as references to a compliance training program for employees and testimony about a whistle -- a concern about a whistleblower complaint that were purportedly addressed. But even taking those isolated statements as the NRA has inaccurately packaged them, they did not preclude any of the Attorney General's claims which are supported by extensive factual allegations, the legal self dealing, conflicts of interest, related party transactions, breach of fiduciary duty and other statutory violations.

Notwithstanding the NRA's rhetoric, the Bankruptcy Court's findings of facts and conclusions of law plainly did

not address whether the standards for judicial dissolution under the N-PCL were satisfied. As your Honor noted, the Court expressly said that it was not weighing in on whether the Attorney General would be able to meet those standards in this action, nor did the Bankruptcy Court make any findings of facts that would preclude the Attorney General to related-party transactions or whistleblower causes of action.

It bears reiterating that the Bankruptcy Court dismissed the NRA's filing for lack of good faith based on findings of improper motive and conduct. The Bankruptcy Court found cringe-worthy evidence of past and ongoing misconduct that had been presented at trial, including repeat violations of internal procedure, Mr. LaPierre's failure to timely file financial disclosures and lingering issues of secrecy and a lack of transparency. These findings are hardly exculpatory and they do not preclude the Attorney General from asserting her claims in this action.

With respect to the NRA's arguments regarding the dissolution claims, the complaint plainly states viable dissolution causes of action under N-PCL-1101 and 1102 as set forth on Pages 17 to 19 of our opposition brief. The complaint lays out the Attorney General's factual findings are pervasive and persistent the legality on the part of the NRA and the egregious trail of assets on the part of

entrenched leadership. Among the allegations the complaint sets forth facts establishing the NRA and its board permitted the diversion of tens of millions of dollars away from the NRA's charitable mission imposing substantial reductions in the expenditures for core program services and contains numerous allegations demonstrating the NRA's systemic misconduct, illegality, mismanagement of charitable assets and abuse of its charitable status.

And if the Court doesn't have any --

THE COURT: Well, look, isn't the hard question here whether the conduct that you allege is proportionate and justifies the relief you're requesting? You know, you have many claims to go after what the complaint pleads at great length as wrongdoing by individuals, and it seems to me, fair to read it as those individuals allegedly tainting the audit committee and the like. But just to take a step back at the beginning of -- or in your complaint, you note accurately that over the course of 149 years, the NRA established itself as one of the largest and oldest social welfare charitable organizations in the country, and you know, that's -- the question is have you stated a claim that the right result, from all of the allegations made, is dissolving that organization rather than the other forms of relief, which are to change the management structure and arguably more targetedly deal with your question. I mean,

maybe an inelegant way to put it is why not use a scalpel rather than a sledgehammer?

MR. CONLEY: Your Honor, courts have long recognized that the Attorney General and the courts have a considerable amount of discretion in determining whether dissolution is warranted in any particular case. And the Attorney General's decision to pursue dissolution here is well supported by the factual allegations of persistent and ongoing illegality that are set forth in the complaint.

I don't want to rehash all the allegations --

THE COURT: Well, I get the point but it's the Court's discretion that you are seeking to have exercised here, and so why shouldn't my lean be to preserve an entity of this vintage rather than dissolving it? Isn't that really the key question?

MR. CONLEY: That is the question, your Honor. But at the motion to dismiss stage, when all allegations in the complaint are to be taken as true and all reasonable inferences are in the favor of the Attorney General, the allegations that are set forth showing 30 years of culture of indignant corporate malfeasance under Mr. LaPierre, Mr. Phillips, the other individual defendants, amply supports the dissolution causes of action as well as the other issues.

THE COURT: Do you think it's capable of reform or

not? Again, taking your allegations as true, most of what the complaint says, it followed the through line, is, you know, the leadership has led to all of these things, you know, none of which are about the advocacy role or all of the reasons why the organization exists. It is a series of financial malfeasance, and so the question is why can't the two be separated? Why can't you address the financial issues without dissolving the entire entity, which, as you say, is a very substantial public purpose.

MR. CONLEY: As alleged in the complaint, your Honor, the NRA has had numerous opportunities over several years, with red flags being presented, to correct its operations and it has, over and over again, elected not to do so --

THE COURT: Which is why you brought this case and why a of the relief you seek seeks the Court's intervention to force that.

MR. CONLEY: Yes, your Honor. And one of the statutory tools available to the Attorney General under the N-PCL is to seek dissolution when corporations like the NRA engage in a pattern of persistent illegality, corporate waste or fraud. The standards have been pled and met here and are supported by the factual allegations that are derived from a very extensive investigation by the Attorney General.

THE COURT: Well, when you look back at the cases that have ordered dissolution, they do tend to involve cases that go to the core of the existence and the business model, you know, that it's not really operating as a charity. And the question is -- and I know maybe it's a matter of degree, do you have a sense for if you took the amount of commerce or money that's involved in your allegations, how does that compare to the size of the entity as a whole?

MR. CONLEY: Your Honor, it's significant, but I wouldn't want to speculate. It's a significant amount of money that has been taken from the NRA's members based off of the illegal conduct that is described in the complaint, but I don't have a percentage figure for you. That, again, I think is a factual question that will be coming out during discovery and a trial.

THE COURT: Would you agree that, again, taking all the allegations as true, there's still some burden on both the Attorney General and the Court to reach the conclusion that the right remedy, or that an appropriate remedy, assuming all of this happened, and it's a lot, the complaint has an awful lot in it, that the law permits as a remedy dissolution rather than addressing the specific problems? And I'm mindful of the fact that the complaint does not talk about the rest of the NRA's mission and I understand that your focus is on something else, but can we

really ignore the rest of what the NRA is and focus only on what seems to be financial malfeasance by a very small core that has expanded, according to the complaint, to broader reaches of the board?

So I get your point, but I'm still focused on when you look at the dissolution cases, don't they seem a little different than this?

MR. CONLEY: No, your Honor, I don't believe they are. The fact that a non-for-profit spent some money on its core mission doesn't immunize it from dissolution when --

THE COURT: Well, that's not quite fair. I mean, look, I get your point. The fact that a sham university might spend some money on books doesn't mean that they can't be dissolved because they're ripping off their students and they don't really operate as a school. But isn't this really the other, and I'm being devil's advocate a little bit here, that the vast majority of what the NRA does is not paid for somebody's flights to the Bahamas?

MR. CONLEY: Your Honor, I think I was just trying to say that there isn't a percentage cutoff on what, if it's appropriately spent, it takes dissolution off the table or where dissolution is appropriate.

What really is at issue, and what we will prove at trial, is that the entrenched leadership of the NRA under Wayne LaPierre for decades has continued to engage in

corporate malfeasance and that it doesn't want -- if he continues to engage in a corporate malfeasance and has not shown any inclination in remedying of those problems and has made repeated attempts to evade New York's --

THE COURT: Look, the malfeasance is all in one sort of broad category; right? It's sort of this entrenchment and really financial entrenchment, you know, using the organization as a means for enrichment and then bringing in people who are just going to foster that environment, I get that. And, again, this whole point is do we need a trial on this if I accept every horrible thing that's in the complaint.

The question is in the exercise of discretion, assuming all of that, can a Court or should a Court find that the appropriate remedy is to essentially get rid of the other parts of the NRA, which are the parts that are not subject to this case. And I'm trying to get a sense for how you balance that when it's a lot of activity that you complain about, but it's all sort of focused in one area, right? So I mean, that's -- I mean, it seems like now is the right time to have that discussion, because you can spend the next two years proving everything that's in the complaint and then we'll still be left with the same question.

And do you have any other dissolution cases that

you think are similar in the sense, that is, financial malfeasance in an extremely large enterprise where, hypothetically, if you got rid of all the bad actors, why wouldn't the rest of the entity be worth saving?

MR. CONLEY: Well, your Honor, this case is unique in the size of the entity, the scope and the nature of the wrongdoing, which is really unparalleled in the non-profit sector. And so there is no close analogy that I can point to that I have a case offhand that I can provide. But that doesn't, like, negate the fact that -- that doesn't mean that dissolution is not warranted given just the scope and significance of the wrongdoing that's alleged.

THE COURT: So I assume we're in common ground that the nature of the advocacy is irrelevant, or of the charity. So, for example, and I'm not sure if the defendants have this analogy in here, but if The Red Cross had a streak of people running it that was misusing funds, would the right result, all things being equal, to dismantle The Red Cross?

MR. CONLEY: Well, I don't want to answer that hypothetical. It would depend on the --

THE COURT: Say everything that happened here, the trips to the Bahamas, all of it. But I'm just saying that The Red Cross serves a purpose, and does the New York statute provide that that's the right answer here? And,

again, you know, it says that you can seek a petition when there's persistent and all this other activity, it doesn't say whether that is the appropriate remedy in an individual case.

MR. CONLEY: Yes. If the facts and circumstances in any other non-profit were the same as those presented here, it would be well within the discretion of the Attorney General and appropriate to pursue the claims of the causes of action that are --

THE COURT: I know you can pursue it, but now the question is whether a Court should do it.

MR. CONLEY: And the answer would be yes, we believe it would be appropriate for the Court to do so.

THE COURT: To dismantle The Red Cross?

MR. CONLEY: Or any non-profit, any non-profit that has engaged in this misconduct, if everything was identical, yes.

THE COURT: And I'm supposed to take into account the interest of the public and the like, that's, you know, what the statute says. So should that not matter at all that there are five million members, a number of whom had tried to appear here and have taken the position, well, look, don't throw out everything just because of some bad actors? You know, isn't the right thing to do is to get rid of bad actors, if that's what they're found to be, and let

the organization reform? That's really what I'm getting at here.

MR. CONLEY: Right, your Honor. And I think that goes to the public interest component of this test. If the Attorney General establishes a standard for dissolution under the N-PCL, then the Court would assess whether it's in the public interest to dissolve it. And as you noted in a prior argument, a hearing, what that encompasses and the procedure for making that assessment is something that we need to --

THE COURT: Well, we have all the facts. The question is your complaint does not suffer from a lack of detail. I mean, the references from the defendants to it being conclusory are hard to grapple with, it is not. So what we're saying -- what I'm saying is assume all of that is proven, and it's a lot, what is the public interest in dissolving an entity that has five million members who probably care a lot about the financial malfeasance if it happened, but probably also want the organization to continue?

MR. CONLEY: It's in the public interest to ensure that non-profits, who have all of the benefits of being a non-profit under the law, follow the law. And because that when entrenched leadership is shown, no interest in changing or reforming in a circumstance like this, it makes

dissolution --

THE COURT: But don't your other claims handle that? Your other claims ask, if you got the relief, to clean house; right? I mean, it's pretty muscular relief you have in the rest of the complaint to have court-enforced removal of people and they can't work in any charity, certainly not this one, and restitution and all sorts of things; why wouldn't that cleaning of house address the ills that are set out in the complaint? Because none of those go to the advocacy part of the organization, they go to whether people are syphoning or taking money they shouldn't be taking.

So I think that's the hard question here, because your other relief would address almost everything you just said, right? I mean, if it was done correctly and you got rid of all vestiges of any negatives that you're able to prove, what's the reason to dissolve the entity at that point?

MR. CONLEY: Well, the reason we are pursuing dissolution is because the NRA has, under the entrenched leadership that remains in power, engaged in conduct that violates New York law, and has consistently. And as set forth in the comprehensive complaint, there are just numerous examples of willful disregard of the law and --

THE COURT: By the leadership. In other words, you

know, you could argue that this is an otherwise -- you know, perfectly acceptable -- people might disagree on the merit or demerit of various positions taken, but it's a perfectly acceptable First Amendment protected kind of organization. And the question is if you can resolve the concerns, because they're all very much leadership focused, they're not mission focused, and you were very careful in the complaint to do that, but why shouldn't the remedy fit the wrongdoing?

MR. CONLEY: Well, the leadership controls the actions of the corporation, and the misconduct that its engaged in and its had control over the organization and is responsible for all of its actions. And the one statutory tool as a remedy when a non-profit, which acts through its agents, is dissolution. We think that that is an appropriate --

THE COURT: Well, we can go around this, but answer my -- the core question I have is what is the public interest, which is the guiding principle in deciding along dissolution, in dissolving this entity?

MR. CONLEY: The public interest is the ensuring that charities that cannot engage in perpetual persistent illegal conduct as a not-for-profit chartered in New York.

THE COURT: Okay. Do you want to address any of the other -- Ms. Eisenberg didn't really get into the other claims. Is there anything you wanted to raise on any of the

other claims?

MR. CONLEY: I think with respect to the NRA's arguments, we're comfortable resting on our papers.

THE COURT: Which one? Both sides are silent.

MS. EISENBERG: May I respond very briefly, your Honor?

THE COURT: Sure.

MS. EISENBERG: Thank you, your Honor.

THE COURT: If you can go do it from over there though.

MS. EISENBERG: Yeah, certainly.

Your Honor, my esteemed opposing counsel can use the words "entrenched leadership" however many times he has, but that doesn't change the fact that the complaint contains only allegations against only two officers who are part of the current management, Mr. LaPierre and Mr. Frazer. And the on against Mr. Frazer entirely sounds in negligence.

THE COURT: Well, I would quibble with you -- well, more than quibble with you. The complaint takes dead aim on the audit committee, and on the board as well, in terms of false statements to the State, financial mismanagement, not overseeing whoever was in charge at whatever point in time. There are claims, only maybe against certain individuals. But I don't think you can read that 193-page complaint and leave saying they didn't really

talk about the organization. They certainly do, but it's, again, in this area.

I mean, the audit committee would rubber stamp things that happened when they found out things that got done without approval, they would retroactively approve them, you know, on and on and on and on. I think the allegations are a lot broader than two officers. They may flow from one or two people, but according to the complaint, which I have to accept as true, they infected a lot more than that.

MS. EISENBERG: Your Honor, I understand what you're saying.

In terms of the numbers that you were asking for, the NRA has a 76-member board, and there are allegations in the complaint about related-party transactions with five of them and the NRA has 500 employees, and there are allegations in the complaint about a select few. Importantly, Mr. Phillips doesn't work at the NRA anymore; Mr. Powell does not work at the NRA anymore. Mr. Phillips' successor, Ms. Rowling is the one who Judge Hale said was the exemplar of compliance and said it was encouraging that she, in fact, became the CFO.

I think, just very specific point on the collateral estoppel. My opposing counsel stated that it was a different legal standard. It doesn't appear to be an issue

that the Court is focused on, but just to make the record, the standard certainly was the same. The New York Attorney General is basing their --

THE COURT: I don't know how you can say the standard is the same. You know, it's an entirely different statutory structure, different statutory scheme. You have a regulator here of New York charities making decisions that go well beyond what a Bankruptcy Court might have to worry about in terms of protecting creditors, which is the Bankruptcy Court's concern, that's not my concern. I'm not here principally worried by the NRA's creditor.

MS. EISENBERG: Your Honor, the statute that the Bankruptcy Judge interpreted and applied also talks about the estate, and the estate is a broad term encompassed to include people like the millions of our members and the public whom we serve. But when I reference the standard, I thought perhaps opposing counsel was referring to the burden of proof, so I just wanted to make the record on that.

Both dissolution claims, as the New York Attorney General admitted, require a high burden showing, and both of them sound in fraud. And under New York law, it's very clear that fraud has to be proved by clear and convincing evidence. And I have two citations for the Court, if I may, 224 AD2d 231 and 54 AD3d 682. So just to address that point. But the bottom line, your Honor, it is not quite

fair. Rule 3211 of the CPLR exists for a reason. If she hasn't alleged facts to merit such relief, even if she proved all of them, the case -- the dissolution claims should be dismissed, and that's what this motion is really about.

THE COURT: Okay. Thank you.

Anything further before we move onto the individual claims?

MR. CONLEY: Just quickly, your Honor, to address opposing counsel regarding the dissolution claims in our conversation earlier.

Four years after the NRA claims it knew it was being investigated, misconduct in the organization continues. Entrenched leadership remains stretching into the board, dissension has been squashed and retaliated against, and members' requests for reform has been silenced, and no other charity has continued to allow such corrupt leadership to remain.

THE COURT: Well, that's the point, right? The question is I take everything you just said and, again, I'm taking the allegations as true. If the problem is entrenched management, isn't dissolution to get rid of the entrenched management rather than to get rid of the entire organization?

MR. CONLEY: Well, your Honor, the NRA has shown

no willingness to remove entrenched leadership --

THE COURT: Because the leaders are the ones who are entrenched, right? I mean, who would be the ones removing them if not -- you know, this is presumably part of the reason why you brought the petition because they're not reforming themselves, so you feel like you need to step in as the regulator and ask the Court to do it. The fact that entrenched management -- entrenched management is, in my experience, rarely removes itself; that's what entrenchment means.

MR. CONLEY: Right, your Honor. But dissolution is a statutory tool available here and the investigation has shown that the NRA leadership has siphoned millions of dollars every year away from mission services. And being above the law is an abuse of charitable status and this waste of charitable assets is simply unacceptable. We've pled claims for dissolution, believe that they're sufficiently supported for all their causes of action, including --

THE COURT: I mean, just to be clear, none of my comments, and these are just questions, are saying that any of it's acceptable if it happened, it's just about what you do about it.

Okay. For the individuals? Thank you.

MR. FLEMING: Good morning, your Honor.

THE COURT: Good morning.

MR. FLEMING: May it please the Court, I'm William Fleming, and I represent Mr. Frazer.

I just want to speak to one point that was just talked about and that's this notion of entrenched management. I just think it's important to note that these are officers, and Mr. Frazer is an officer who is elected every year by the board. He can be voted out. The board, of course, changes a lot. I think you've known from all the parties' prior papers on these issues. So there is a sort of a dynamism of the organization that does exist. I don't know that entrench is really the word that works here, but let me speak to --

THE COURT: Well, you've had the -- the leader has been there for more than 30 years. There's not necessarily anything wrong with that, but it's certainly a long tenure.

MR. FLEMING: Okay. Well, Mr. Frazer, to speak to him for a minute personally, so he is the secretary of the NRA, which is an officer position voted on, like I said. He's also the general counsel, which is an employee position, not voted on, not an officer. The secretary's duties are listed under the bylaws. The bylaws are attached to my affidavit at Exhibit 1, I think it's Exhibit 1. He's responsible for the archives; he's responsible for publication of notices and reports and attestations; he's

responsible for other duties as assigned; and he serves as secretary to the board of directors, the executive committee, the nominating committee and the committee on selections, and that's the scope of his bylaw-determined responsibilities.

Now, he was never interviewed in this investigation, the Attorney General's investigation. He was just named a defendant when they filed in August of 2020, and he was named as a defendant in four causes of action that seek, in order, to compel him to account for his official conduct under N-PCL 720(a)(1), to secure the proper administration of a not-for-profit corporation under EPTL 8-1.4(M), to enjoin him from continuing the solicitation and collection of funds under Executive Law 175(2), and to disgorge his compensation under the common law theory of unjust enrichment.

I'm going to start with the last, your Honor. We spent, I think it's fair to say, a majority of our briefing on the last cause of action, which is the derivative claim for common law relief. Now, the Attorney General brought the derivative claim in the right of members under Section 623, which we're all familiar with by now, and they use it to assert a common law claim. And as we've noted at length, the Court of Appeals has spoken very clearly that common law relief under the N-PCL is not permitted.

THE COURT: That was a parens patriae action, I assume you're referring to the Grasso case.

MR. FLEMING: Yes.

THE COURT: Isn't that different than this kind of case, which the Court was concerned there that sort of upsetting the statutory regime and the like? And, here, the statute says that they can essentially exercise member's rights, and one of the member's rights is this kind of a claim. So I don't see how Grasso comes into it.

MR. FLEMING: Well, your Honor, first of all, the Court determined on grounds other than the parens patriae, they kind of ruled that out, okay. And what it said very clearly, very clearly, was that the N-PCL is a comprehensive enforcement scheme for not-for-profits and that it is incompatible with that scheme -- that's their word, incompatible with that scheme to assert a claim for liability without fault. You have to show or allege and then ultimately show that the actor had knowledge of unlawfulness, while he executed whatever act, is at issue. And with Mr. Grasso, in that case, they determined that there had been no allegation, no proof, that he had acted with knowledge of unlawfulness, and that is the overriding requirement of this N-PCL scheme.

THE COURT: But when you read this complaint, do you think that there are no allegations that Mr.

Frazer -- you know, again, Mr. Grasso, just received his salary and he said, you know, I had nothing to do with it, they decided to pay me, what can I do. That's not the allegations here. I mean, they have a lot of specific allegations about financial malfeasance, may or may not be true, but it's not the same as Grasso.

MR. FLEMING: I don't agree with that, your Honor, for two reasons; one is, let's just be clear about one thing: A common law claim, unjust enrichment, as a matter of its elements, does not require proof of fault. So it is out, it has to be out. I mean, Grasso is very clear on it, it says that unjust enrichment does not require proof of fault, therefore, you are subjecting a defendant to a lower burden of proof than the N-PCL requires; that's point one.

Point two, your other question is with respect to the statutory claims. They also require fault, and then the question is whether the allegations sufficiently make out fault. And we contend, for a lot of reasons in our brief and that I'll get to, that they do not with respect to Mr. Frazer, they do not. They don't allege knowledge of unlawfulness -- can you hear me okay?

THE COURT: Yes.

MR. FLEMING: They allege a lot of things. They allege that he's -- I mean, it's a little insulting, but they allege that he's incompetent; they allege that he's

inexperienced; they allege that he's negligent, but they don't allege that he knew what he was doing was unlawful. They just don't do it, it's not in the complaint.

Now, the common law claim also we have written in our brief, and I will just move quickly past it, you know, violates 623. It doesn't allege the five-percent requirement; it does not allege with any particularity whatsoever why it would be futile to make this claim on the board. And I think that's especially important and relevant in the wake of the bankruptcy case decision, because as we put in Page 10 of our moving brief, there's a number of reasons to reach the opposite conclusion. That would not be futile to make such a demand on the board. The board authorized investigations, subsequent to which they examined related-party transactions and vendor contracts. They instituted a lawsuit against the company's largest vendor on that basis. They terminated personnel, they terminated compensation arrangements and they recovered expenses from individuals including Mr. LaPierre that were deemed not sufficiently corporate. So the board acted. And for the Attorney General to claim that its futile to seek -- to make a demand on the board, I think, is erroneous.

So I think the 18th cause of action, your Honor, has to go. I would urge you to read Grasso very closely. I've read it, unfortunately, like 20 times now, and so I'm

very familiar with it, but I don't see -- it's four square, that's my contention.

THE COURT: Okay. I'm going to take a short break for my court reporter to -- I usually do it after an hour and I just looked down and I realized I didn't. So just five minutes.

MR. FLEMING: Very good.

(Recess taken.)

(Case recalled.)

THE COURT: I'm sorry. I thought, Mr. Fleming, you were finished.

MR. FLEMING: I'm sorry. I have three more causes of action to go through.

THE COURT: Okay. Well, we're going to start losing time here. So since your other colleagues are going to be addressing some of the same points, I would ask you to try to consolidate.

MR. FLEMING: Okay. Your Honor, I will try to consolidate. I'll be quick as best I can. I do think there's some difference. For instance, the next cause of action, I believe, without being completely sure, is specific to Mr. Frazer.

The 17th cause of action under the Executive Law which governs solicitation of funds, as I said, they're seeking to enjoin his continued solicitation and collection

of funds. The first point I would like to make is that he does not and has not ever collected or solicited funds, so there's nothing to enjoin. And it's very confusing for that reason and there's no allegation to the contrary. They don't say, He collects, he solicits, therefore we need to enjoin him. It's not in there.

Second, this is the charge that relates to falsities in the filing of the CHAR 500 form. You know, Mr. Frazer relied on specialists. And as I said before, the N-PCL is a comprehensive enforcement scheme, and though this is the Executive Law, the N-PCL specifically governs this as well. N-PCL 520 ensures that. It says, and I quote, "all registration and reporting requirements pursuant to Article 7-A of the Executive Law" -- which is this claim that we're talking about -- "and Section 8-1.4 of the EPTL" -- which is the next claim we'll be talking about -- "are expressly included as reports required by the laws of this state to be filed within the meaning of this section", which is N-PCL-520. So as an overarching matter, I would contend that the interpretation of the N-PCL supplied by the Court of Appeals in Grasso requiring proof that the actor acted with knowledge of unlawfulness has to apply to these Executive Law claims and the EPTL claims.

Next point on this same cause of action, so he relied on specialists, and the N-PCL 717, it statutorily

endorses such reliance, and it makes sense as well, your Honor. Mr. Frazer gets a report or is helping -- doing a solicitation report that attaches a tax form 990 and attaches the audited financial statements for which he doesn't play a role in their creation, and they are finished and certified by independent auditors --

THE COURT: How is that a motion to dismiss? In other words, you're bringing in facts outside the complaint.

MR. FLEMING: No, no. I think it is a question of law, because what he says is, These are true and correct to the best of my knowledge and ability, or words to that effect. I have them here, but in the interest of time, I'll move on. If that statement is to the contrary and you don't have the belief that they're true and correct, that's actionable. But if you believe they're true and correct, that is not actionable. The statements made by others do not glom onto that to create a matter of strict liability which Grasso says is verboten.

Now, the last thing on this Executive Law claim is the New York Attorney General ignores the legislature's chosen remedial scheme for violations of this sort. So even if there were violation, they say what is permitted in the statute is, as I said, to enjoin continued solicitation and collection of funds, and what their relief requested is is a lifetime bar, which is not in the statute anywhere, a

lifetime bar from ever working as an officer, director or trustee of any non-profit who is authorized to do business in New York. It is beyond the remedial scheme set forth by the legislature. It creates a separation of powers problem. It breathes into the statute something that's not there. I would just say that in this case, we've got a case where the Attorney General has combed through the corporate records of a targeted organization to find a basis to impose extra statutory punishments. And it's an overreach, it really should not be permitted.

Your Honor, the eighth cause of action, very quickly, this is the EPTL claim. I've already spoken a little bit about it. You know, it alleges a breach of trust that entitles it, according to the Attorney General, to restitution, damages, and a lifetime bar again, but that's not the remedy. The remedy permitted is -- this is 8-1.4(m), "the Attorney General may institute appropriate proceedings to secure compliance with this section and secure the proper administration of any trust or corporation". That's the remedy that's permitted. Not restitution, not damages, not certainly a lifetime bar, which is what is being requested. Again, it is an overreach. And, again there are no allegations to demonstrate fault.

And I'll make another point about this. The

allegations against Mr. Frazer are specifically that he is responsible for holding and administering property. This is different from allegations made against Mr. LaPierre and Mr. Phillips that say they held and administered property. And what I would argue to your Honor is what they're saying is that Mr. Frazer has a nominal responsibility, not that he actually held anything, not that he actually administered anything, but that he's responsible and, therefore, liable. That's strict liability. Again, that cannot be permitted.

You know, there are also questions about whether he's even a trustee. There's one bald allegation in Paragraph 31 of the complaint that says the individual defendants are each trustees. No authority for it, there's no factual explanation for it. The language of the statute is a little ambiguous. It certainly says that the corporation, the NRA is a trustee. It also says that individuals can be trustees, but it includes a lot of language about -- it's a little vague, but it says pursuant to an instrument, a will, agreement or by operation of law. We're confused because we have no understanding of being a trustee. The corporation doesn't treat us as a trustee on tax forms, which is not before your Honor. I just mention it in passing. So it's confusing that there's an open question there as well. But the other point I make are absolutely the case. The remedies sought are beyond the

statute permits. They don't allege knowledge of unlawfulness, which is what they must do.

And the last cause of action -- I'm sorry, it's hard to breathe -- under N-PCL, this is the fourth cause of action, N-PCL 720(a)(1), that statute needs to be read very closely. It's odd, but it says an officer can be held liable to account, to account, for his official conduct, basically, that's (a)(1); (a)(2) says you can set aside a transfer provided that the transferee had knowledge of its unlawfulness; and (a)(3) says you can enjoin that type of conduct. So it's account for, or, in my view, explain, set aside (a)(2), which is not here, or enjoin if it's (a)(3), which is not here. And 720(b) indicates by its language that those are the remedies, that's it; 720(a) permits you to be called to account, and I don't think that's accounting. And I made the mistake myself of putting "accounting" in my brief and it occurred to me that I was mistaken. You call to account. If, after doing so, a basis of wrongdoing is established, the Attorney General's remedy, as they appear to acknowledge, is removal under 714 or 706 for cause. Once again, the fault standard consistently be applied in the N-PCL, and it's an error, we believe, respectfully, to read it to not have that fault standard.

So, your Honor, that's the whole of our motion. We think that the claims should be thrown out. I'm happy to

answer questions or get up on rebuttal.

THE COURT: No. That's very good. Thanks.

Mr. Correll.

MR. CORRELL: Thank you, your Honor. I'll try to keep this very brief. I know we're a little short on time.

First of all, I want to adopt the arguments that Mr. Fleming has made to the extent that they apply to my client, Wayne LaPierre. And I'll simply take my time to talk a little bit more about Grasso, which I know the Court has probably read and may even want to read again. But --

THE COURT: Maybe not 20 times, but...

MR. CORRELL: So, in 1969, the legislature sat down to grapple with the idea of non-profits and how they should be overseen and regulated, and what, if any, remedies should be provided for enforcement and came up with a comprehensive scheme that seemed to work well for a while until 2004, when the Grasso situation emerged, and it drew a lot of attention. And the Attorney General, then Attorney General Spitzer, commenced an action asserting eight causes of action, six against Mr. Grasso, one against the New York Stock Exchange and one against Kenneth Langone. And Judge Ramos was faced with a motion like the motion that you're faced with today, which is to dismiss the claims, and he denied the motion. And it went to the Appellate Division. The Appellate Division in a split decision majority reversed

on the ground that the legislature had codified a fault-based scheme and that the non-statutory causes of action, of which there where four asserted against Mr. Grasso, were inconsistent with that scheme and incompatible with the remedies that had been created by the legislature and raised very serious separation of powers issues, constitutional issues, and --

THE COURT: Well, wasn't the key to that whole case that he played a sort of a passive role of -- you know, the Attorney General can't just wake up and say, Well, you received too much money, therefore, give it back, you know. But that's not really what the allegations are here.

MR. CORRELL: Well, your Honor, there were two sets of claims, and the Appellate Division split them into two categories, statutory and non-statutory. The non-statutory claims, two of those were unjust enrichment claims just like the 18th cause of action here, virtually indistinguishable. The other ones were purportedly statutory claims, but they actually alleged knowledge of unlawfulness, which is the element that is absent from an unjust enrichment claim. And so the Court of Appeals, the Appellate Division and the Court of Appeals kind of split the baby. They allowed the two statutory claims to proceed. They were eventually dismissed for other reasons, but dismissed the four non-statutory claims including the two

unjust enrichment claims. There was one related to a loan and there was one related to some other transaction, but the Court found that the statute was infused with this idea of fault and this notion that, in order to promote non-profit organizations and attract non-profits to this state so the people considering forming non-profits will form them here and to encourage people to accept the responsibility of serving as officers and directors of non-profit.

They wanted -- the legislature wanted to give them protection, a safe harbor for good faith, and said, There shall be no liability by reason of being an officer or director of officer or director of a non-profit if you do your duty. And they provided it specifically in Section 720. And Section 717 and Section 720 were the two provisions that were the key fault-based provisions on which both the Appellate Division and the Court of Appeals focused. It expressly stated that a transfer could only be set aside if you allege and proved knowledge of unlawfulness.

Now, if you look at the complaint here, you will not find the statement that Mr. LaPierre acted with knowledge of unlawfulness with respect to any of these transactions. And they certainly don't say it with respect to the unjust enrichment --

THE COURT: You don't say -- again, you know, when

dealing with a motion to dismiss, I'm supposed to take all reasonable inferences in the plaintiff's favor. You don't think, over that long stretch of the complaint where they talk about, whether it's airfare or other kinds of related-party transactions, or conflicts of interest, that I can infer that the person doing those was aware that it was unlawful?

MR. CORRELL: Your Honor, I know it's a tough standard to meet, but I don't think you can. And I think that there are no facts that suggest that Wayne LaPierre knew that flying private for security reasons or for efficiency reasons, or for whatever reason, was unlawful and that he did it anyway. I've read the complaint. When I read that complaint, I cannot come to that conclusion, even giving the Attorney General the benefit of the doubt.

So let me move to another issue. There are two causes of action which seek damages, and if you look at 720, and Mr. Fleming did a nice job of going through 720, there's no authorization to seek that relief in 720. The legislature gave the Attorney General a toolkit, gave the Attorney General certain authority, said, These are the actions you can bring against officers and directors, this is the standard of proof you've got to meet, and this is the relief you can obtain. And if you look at 720, you won't see damages mentioned. So what I'm asking you to do for Mr.

LaPierre is to dismiss the four causes of action asserted against him on the grounds that they are --

THE COURT: I'm sorry. Hang on just one second. We just lost our -- unless you have people listening who you don't want to proceed without, we'll just keep going.

MR. CORRELL: I'm happy to keep going, your Honor.

THE COURT: Okay.

MR. CORRELL: And I'm almost finished.

But the point is is that these claims against Mr. LaPierre do not pass Grasso muster. And, Judge, Chief Judge Kaye wrote an elegant opinion that was unanimous and laid out the reasoning, and I thought that the Appellate Division did a very nice job also of explaining the reasoning. So it's not that the Court has to go back and interpret the statute again. It's been interpreted by the Appellate Division First Department and also by the Court of Appeals. And I'd respectfully submit that that is binding precedent, at least with respect to the unjust enrichment claim, and, I would also argue, with respect to the other claims because if you look at them, you'll see no mention of knowledge of unlawfulness, you'll see no allegation of bad faith. And all the Attorney General can do is say, Well, like we've said so many things about so many people that one could reasonably infer bad faith or knowledge of unlawfulness on the part of Mr. LaPierre. But to get there, you've got to

impute to Mr. LaPierre things that other people have done, which the AG alleges were concealed, were done without anyone's knowledge.

So I respectfully submit that applying the Grasso standard to these claims requires dismissal.

THE COURT: Thank you.

Mr. Conley, are you handling this one? One-man band.

MR. CONLEY: As a threshold matter, however the defendants want to qualify it, we're on motions to dismiss that are barred by the single motion rule, and these arguments should've been included in their original set of motions that were denied by this Court, but were not.

With respect to the arguments by Mr. Frazer and Mr. LaPierre's counsel, we are confident that on a full record, we will establish all of the causes of action that's pled in the complaint, including the causes of action asserted against them.

With respect to Mr. Frazer's alleged in the complaint, Mr. Frazer served as the NRA secretary and general counsel since 2015, and over those six years, is one of the NRA's five salaried officers. He has routinely turned a blind eye to egregious displays of corporate waste and malfeasance and taken part in disputing a culture of self dealing, mismanagement and negligent

oversight. Individually and collectively, we believe that the allegations in the complaint amply support viable causes of action for Mr. Frazer for breach of fiduciary duty, improper administration of the NRA's charitable assets, false filing and unjust enrichment. Regarding Mr. Frazer's counsel's arguments with respect to the remedies, all of the remedies sought against Mr. Frazer are encompassed by the statutes and properly pled.

With respect to the 17th cause of action for false filing, Executive Law 175 is a remedial provision for violations of charitable solicitation and Mr. Frazer signed and certified the NRA's annual reports filed with the Attorney General for several years, as is alleged in the complaint. The EPL provides the Court with the power of providing equitable relief with the authority to impose a bar and a fashion remedy that address the harms to the charitable sector. And as the general counsel and secretary, Mr. Frazer cannot disavow fiduciary obligations to protect the administration of NRA's assets.

Regarding the dependance on the Court of Appeals decision in Grasso, Grasso does not apply here. The arguments that Mr. Frazer and Mr. LaPierre make with respect to Grasso is a misreading of what is really a pretty narrow holding. There, the Court held that the Attorney General does not have parens patrea authority to bring common law

claims on her behalf because the legislature provided a specific statutory vehicle to pursue those claims. The Court did not address the corporations authority to bring common law claims for the Attorney General's authority to assert those claims in a derivative capacity on behalf of the corporation.

And for the 18th cause of action for unjust enrichment, the Attorney General is bringing those claims under her statutory authority in N-PCL 12(a)(7) --

THE COURT: Let me ask you about the 18th cause of action for a moment. That one is explicitly a derivative claim; correct?

MR. CONLEY: Yes.

THE COURT: So the demand futility, we were here a few months ago with an intervenor, and the argument was made and accepted, principally on the five-percent rule, but also at that stage, I don't remember what the Attorney General's position was frankly, but that, well, you know, the NRA has a special litigation committee and et cetera, and that they had not, they had not anyway, sufficiently pleaded demand futility. So, A, does the Attorney General have to plead demand futility, and if so, what do you make of the argument that I've already held that demand was not futile, at least in the context of a different complaint?

MR. CONLEY: Your first question, your Honor, the

Attorney General takes the position that she does not need to plead demand of futility under 623, as your Honor noted in the Court ruling on intervention motions in September. These procedural requirements, and that was largely in the context of the five-percent threshold requirement, but I think it applies equally with respect to the Attorney General's authority to bring claims on behalf of members.

THE COURT: Did you say I held that the Attorney General doesn't have to plead futility back then?

MR. CONLEY: No, no, your Honor. It's consistent with your reasoning in saying that the five-percent rule wouldn't necessarily --

THE COURT: Yeah. Look, I don't think that the five-percent rule probably applies because that would mean the Attorney General would need four hundred or four million people to join her, which doesn't seem like that's what's required. But the demand futility is a more substantive question, you know, at least part of Grasso and -- I'm sorry, the Lefkowitz case, I think. The Attorney General does not have roving authority to just come in and bring every conceivable common law claim that shareholders could bring. Does she have to make a demand on the Board? And if not, why not? I think you do plead demand futility.

MR. CONLEY: We do plead demand futility. We did not think that the procedural requirements in 623 applied to

the Attorney General, and just in that with respect to the five percent rule.

With respect to the demand futility requirement, we think that it is different for the Attorney General in that she exercises rights differently in her unique role as a law enforcement officer with supervisory authority. But --

THE COURT: Well, in this setting, she's operated -- I assume the statutory basis for that one claim is that the provision that says she can exercise the rights of the members. So in that setting, she's not the Attorney General, she's -- well, she is the Attorney General, but she's exercising the rights of a member and the member can't just bring a case for a derivative action on her or his own without pleading demand futility.

But let me just get the substantive point. You know, they say that, look, the board has gone after some people, it's not been inert, why can't the board, in the first instance, make the decision whether to go after any of these defendants?

MR. CONLEY: Well, as we set forth in the complaint at Paragraph, I believe, 750, we think that we have met the particularity standard. We've alleged with particularity a demand by the members to assert the claim for unjust enrichment would be futile because the NRA's board and its committees have failed to fully inform

themselves about a challenge transaction.

Again, the NRA has been on notice with respect to the allegations in the complaint and the Attorney General's investigation for years and has not done anything to try to address or account for that. They've just -- as is exemplified by the fact that they tried to escape this action, by fueling for bankruptcy in Texas.

THE COURT: So you think you've succeeded where the intervenor failed. I'm trying to get a sense of whether you're trying to say that I need to reconsider that part of my decision from the intervenor motion. The intervenors still lose because of the five-percent issue, but I did say in there that they did not adequately allege demand futility and they make some of the arguments you are.

I am genuinely grappling with this to understand what the right answer is on this one. You know, obviously you have lots of arguments that one of the defendants controls some of the board if not more than that, but do I have to revisit that decision?

MR. CONLEY: No, your Honor, I don't believe. But at the same time, I do believe that we have adequately demand futility in our complaint for all of the reasons set forth.

THE COURT: All right. Thank you.

MR. CORRELL: Your Honor, if I may respond.

THE COURT: Yes, of course.

MR. CORRELL: Just the main point is that I wanted to remind the Court that the Appellate Division did not reach the parens patriae issues and nor did the Court of Appeals, and so it's really unfair to characterize the holding as being limited in that way.

The holding of Grasso, as I read it, is that the Attorney General, in exercising powers over non-profits or non-profit officers or directors, is limited to the causes of action and the relief provided for by the legislature in the statutes, and that if the Attorney General steps beyond that to assert, say, a cause of action for unjust enrichment, then the Attorney General is out of bounds. If the Attorney General steps beyond that to, say, asked for damages rather than restitution, the Attorney General is out of bounds.

So all I'm asking you to do on Mr. LaPierre's behalf is to take that scalpel out and go through and trim off whatever it is that is hanging over the edges that Grasso says is more than the remedial package that the legislature gave. And you have to do that because the Court doesn't have the power either to go beyond what the legislature said. It's not just the AG, so it's a double separation of powers issue. So I'd just urge the Court to read the case carefully and to apply the rule faithfully.

Thank you, your Honor.

THE COURT: Anything further?

MR. FLEMING: Your Honor, I'll resist the temptation. It's really more of the same, so I'll rest. Thank you.

THE COURT: Are there any of the folks who are on Teams who have anything they need to add?

Mr. Farber, you're on mute.

MR. FARBER: I apologize, your Honor. No, I don't. Thank you.

THE COURT: Okay. Well, I think that concludes the oral argument, and I thank everyone.

I'll take the motions under submission. And we can now go off the record for a brief moment and convene the status conference.

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VANESSA MILLER
Senior Court Reporter